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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

No. _____

Nilson Van and Storage, and Howard A. Nilson, Petitioners

versus

The United States of America

A Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

---

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QUESTIONS PRESENTED

1. Whether the Government can appeal an order granting a criminal defendant a new trial when the statute permitting appeal was enacted after the new trial order became final?

2. Whether the United States Court of Appeals For the Fourth Circuit erred in reversing the grant to petitioners of a new trial on the grounds that fraudulent intent is not a necessary element under 18 U.S.C. § 1001 and that materiality, although an essential element of the offense, is a question for the court rather than the jury?

3. Whether the abuse of discretion standard applies to appeals by the Government as well as to appeals by defendants of new trial orders in criminal cases?

PARTIES TO THE PROCEEDING BELOW

Nilson Van and Storage

Howard A. Nilson

The United States of America

John O. Marsh, Jr., Secretary of the United States Department of the Army

John Lehman, Secretary of the United States Department of the Navy

Verne Orr, Secretary of the United States Department of the Air Force

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No. _____

Nilson Van and Storage, and Howard A. Nilson, Petitioners

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A Writ of Certiorari to the
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for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioners pray that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered February 13, 1985, which reverses the district court's April 27, 1984, order granting petitioner a new trial.

OPINIONS BELOW

The opinion of the Court of Appeals which reversed the district court's grant of petitioners' motion for a new trial is reported at 755 F.2d 362 and appears in Appendix A hereto. The Order of the Court of Appeals denying the petition for rehearing and suggestion for rehearing en banc is unreported and appears in Appendix B hereto.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on February 13, 1985. A timely Petition for Rehearing and suggestion for rehearing en banc was denied on March 18, 1985, and this petition for certiorari was filed within 60 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Article 1, § 9, clause 3, provides:

No bill of attainder or ex post facto law shall be passed.

United States Constitution, Amendment VI, provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

18 U.S.C. § 1001 provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme,

> or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

18 U.S.C. § 3731 (1982) provided in pertinent part:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

18 U.S.C. § 3731 (1982), as amended by the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473 § 1206, 98 Stat. 2153, provides in pertinent part:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or

information or granting a new trial after verdict or judgment, as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

* * *

An appeal by the United States shall lie to a court of appeals from a decision or order, entered by a district court of the United States, granting the release of a person charged with or convicted of an offense, or denying a motion for revocation of, or modification of the conditions of, a decision or order granting release.

STATEMENT OF THE CASE

Nilson Van & Storage and Howard A. Nilson (collectively referred to as "Nilson") were indicted in a three-count Indictment alleging an antitrust violation, making a false statement under 18 U.S.C. § 1001, and mail fraud. Nilson was convicted under Section 1001 and acquitted of the remaining charges. Upon a timely filed motion, the district court granted Nilson a new trial on April 27, 1984, on the ground that the jury instruction omitted the element of fraudulent intent. On May 9, 1984, the Government moved for reconsideration of the order. After the case was rescheduled for trial, Nilson moved to dismiss the remaining count on the ground of double jeopardy. The district court denied the motion but certified it as not frivolous, and Nilson appealed to the Court

of Appeals for the Fourth Circuit. The Government's Motion for Reconsideration remained unresolved. On September 10, 1984, while the double jeopardy appeal was pending, the Government sought from the Fourth Circuit a Writ of Mandamus directing the district court to reinstate the guilty verdicts and to vacate its order granting a new trial, or to rule on the Government's Motion for Reconsideration. The mandamus petition was summarily denied by the Fourth Circuit on October 5, 1984. See In re United States, No. 84-1959 (4th Cir. October 5, 1984). On September 19, 1984, the district court denied the Government's Motion for Reconsideration. Each of these events occurred prior to the enactment of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 1206, on October 12, 1984, which, in pertinent part, amended 18

U.S.C § 3731 to permit appeal by the government of orders granting new trials. The Government noticed its appeal on October 18, 1984.

The double jeopardy and new trial appeals were consolidated and argued before a panel of the Fourth Circuit on December 4, 1984, and an opinion was filed on February 13, 1985. The Fourth Circuit concluded that it had jurisdiction to consider the Government's appeal from the new trial order by retroactively applying the amendment to Section 3731, reversed that order on the grounds that fraudulent intent is not an essential element of a Section 1001 violation and that materiality is an issue for the court, not the jury, without discussion of the standard of review applied to the district court order, and dismissed

the remaining appeals without substantive consideration.

Petitioner filed a timely Petition for Rehearing pursuant to Rule 40, Federal Rules of Appellate Procedure, and a suggestion for a rehearing en banc pursuant to Rule 35 of those rules. The petition urged the court to reconsider its decision on the ground that it contradicted prior decisions of that court, overlooked a material fact and appeared to apply a lower standard of review to appeals by the Government than is applied to appeals by a defendant. The petition was denied, without elaboration, on March 18, 1985.

REASONS FOR GRANTING THE PETITION

Petitioner submits that the Comprehensive Crime Control Act of 1984, as applied in this case, constitutes an ex post facto law. Moreover, the decision of the Fourth Circuit in this case is directly contrary to a decision of the Eleventh Circuit Court of Appeals in United States v. Fernandez-Toledo, 749 F.2d 703 (11th Cir. 1985), on the retroactivity issue, and is directly contrary to a decision of the Seventh Circuit in United States v. Brack, 747 F.2d 1142 (7th Cir. 1984), and a decision of the Ninth Circuit in United States v. McLennan, 563 F.2d 943 (9th Cir. 1977), on the essential elements of 18 U.S.C. § 1001. Further, whether materiality of a false statement must be determined by the jury, and what standard of review applies to appeals by the Government of new

trial orders, are important questions of federal law which should be settled by this Court.

A. Retroactive Application of the Amendment to Section 3731 Constitutes an Ex Post Facto Law.

Petitioner submits that retroactive application of amended Section 3731 to permit the appeal of the new trial order in this case constitutes an ex post facto law.[1] Article 1, Section 9, U. S. Constitution. The prohibition against ex post facto laws includes any statute "which, in its

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[1]The right of the government to appeal criminal cases is extraordinary and disfavored in American jurisprudence. E.g., Carroll v. United States, 354 U.S. 394, 400 (1957). It is so disfavored that, unlike other statutes granting appellate jurisdiction, the statute permitting the United States to appeal in criminal cases has been strictly construed against a right of appeal. United States v. Sisson, 399 U.S. 267 (1970).

operation, makes that criminal which was not so at the time the action was performed, or which increases the punishment, or, in short, which, in relation to the offense or its consequences, alters the situation of a party to his disadvantage." United States v. Hall, 2 Wash. C. C. 366, 26 Fed. Cas. 84 (1809), quoted in Thompson v. Utah, 170 U. S. 343, 351 (1898), and Kring v. Missouri, 107 U. S. 221, 228 (1883) (emphasis in original). Application of the 1984 amendment to Section 3731 to this case would materially disadvantage Nilson by transforming mere accusations into convictions.

The critical question under the ex post facto clause is whether "any substantial right which the law gave the defendant at the time to which his guilt relates [is] taken away from him." Kring, 107 U.S. at

232. Accord, Weaver v. Graham, 450 U. S. 24, 30-31 (1981). This Court has found the right to bail to be a substantial right. Kring, 107 U. S. at 232. The right to a new trial is certainly as substantial as the right to bail.

The inability of the Government to appeal adverse decisions was and is a substantial protection for criminal defendants. Prior to passage of the Comprehensive Crime Control Act of 1984, criminal defendants had an absolute right not to have the Government appeal orders granting new trials. To deprive these criminal defendants of that right would be an ex post facto law. Thompson v. Utah, 170 U. S. at 351-52.

Moreover, to permit the Government to appeal the new trial order penalizes Nilson Van and Storage and Nilson for exercising

their right to appeal their claim of double jeopardy. The new trial granted to Nilson included the right to a speedy new trial. U.S. Constitution, Amendment VI. The constitutional right to a speedy trial, as implemented by Congress in the Speedy Trial Act, entitled Nilson to a new trial within seventy days of the district court's April 27, 1984, order. 18 U.S.C. § 3161(e). Therefore, not only was Nilson entitled to a new trial after the April 27, 1984 order, but Nilson would have actually received a new trial by the time the Comprehensive Crime Control Act of 1984 was passed, were it not for Nilson's appeal of the double jeopardy claim. The Fourth Circuit has in essence said that Nilson forfeited the right to a new trial by exercising the right to appeal the double jeopardy claim. To exact the loss of their undisputed right to a new

trial, and the corresponding presumption of innocence, upon the defendants as a cost of pursuing their double jeopardy appeal is clearly impermissible. See Kring v. Missouri, 107 U. S. at 234-35.

B. A Split in the Circuits Exists on Retroactive Application of the Amendment to Section 3731.

The Comprehensive Crime Control Act of 1984, signed into law on October 12, 1984, amended 18 U.S.C. § 3731 to permit the Government to appeal orders granting new trials and orders granting bail. The Fourth Circuit applied that amendment in this case to permit appeal by the Government of the district court's April 27, 1984, order granting Nilson a new trial. The Eleventh Circuit in United States v. Fernandez - Toledo, 749 F.2d 703 (11th Cir. 1985), refused to apply the amendment retroactively to confer jurisdiction of an appeal from an

order granting bail, which order was entered prior to the enactment of the amendment to Section 3731.

The Eleventh Circuit recognized the general rule, stated in Bradley v. Richmond School Board, 416 U.S. 696 (1974), that a new statute should be applied in pending cases "unless manifest injustice would result." 749 F.2d at 705. The Eleventh Circuit reasoned, however, that it would be manifestly unjust to apply the amendment to persons who were entitled to be released and whose release had been ordered at the time the amendment became effective. 749 F.2d at 705.

The Fourth Circuit, also citing Bradley v. Richmond School Board, reached the opposite result in this case. The Fourth Circuit ignored the fact that after its denial of the Government's petition for

mandamus, the Government had no other means to overturn the order granting Nilson a new trial and therefore Nilson was irrevocably entitled to a new trial before Section 3731 was amended.

When the district court granted Nilson's motion for a new trial on April 27, 1984, the government had no right to appeal that order. 18 U.S.C. § 3731 (1982). The only avenue of review available was a petition for writ of mandamus. The Government requested a writ of mandamus from the Fourth Circuit and the Fourth Circuit denied that request on September 19, 1984. Accordingly, on September 19, 1984, Nilson stood indicted but unconvicted, presumed innocent, and irrevocably entitled to a new trial. Furthermore, that new trial would have occurred prior to the enactment of the amendment if Nilson had not appealed the

double jeopardy issue. 18 U.S.C. § 3161(e). Application of the amendment to Section 3731 to permit appeal of the new trial order entered five months earlier and to work a forfeiture of Nilson's right to a new trial would result in manifest injustice.

Rather than viewing Nilson's position at the time of the amendment, and considering the effect that retroactive application would have on those rights as the Eleventh Circuit had done in United States v. Fernandez-Toledo, the Fourth Circuit looked at the merits, concluded that the new trial was erroneously granted, reasoned accordingly that no manifest injustice would result, and applied the amendment retroactively. This conflict among the circuits on the retroactive application of amended Section 3731 should be resolved by this Court.

C. A Split in the Circuits Exists on the Essential Elements of 18 U.S.C. § 1001.

The decision of the court of appeals in this case differs from decisions of other courts of appeals on two of the elements of 18 U.S.C. § 1001, fraudulent intent and materiality. A split in the circuits exists on whether fraudulent intent is necessary and on whether materiality is a question of fact for the jury or a question of law for the court.

1. Fraudulent intent

The district court in this case granted Nilson a new trial because it believed that the jury was not adequately instructed that fraudulent intent was a necessary element of Section 1001. The Fourth Circuit reversed the new trial on the ground that fraudulent intent is not a necessary element of a Section 1001 violation. 755 F.2d 362, 367, citing, United States v. Norris, 749 F.2d

1116, 1121 (4th Cir. 1984), which also held that fraudulent intent is not an essential element of a Section 1001 violation. This decision of the Fourth Circuit is contrary to decisions of the Seventh and Ninth circuits on that issue.

The Seventh Circuit held in United States v. Brack, 747 F.2d 1142, 1146-47 (7th Cir. 1984), cert. denied, ____ U.S. ____, 105 S. Ct. 1193 (1985) and United States v. Stanford, 589 F.2d 285, 298 (7th Cir. 1978), that 18 U.S.C. § 1001 does require fraudulent intent. The Ninth Circuit also regards fraudulent intent as an essential element of 18 U.S.C. § 1001. United States v. McLennan, 563 F.2d 943 (9th Cir. 1977). This conflict among the circuits on whether fraudulent intent is a necessary element of Section 1001 should be resolved by this Court.

2. Materiality

The district court, while questioning the rationale of eliminating an essential element from jury consideration, followed the Fourth Circuit's ruling that materiality is a question of law rather than fact,[2] and refused to submit the question of materiality to the jury. Rather than omitting reference to materiality in the charge, however, the district court instructed the jury that the statement was material. Upon consideration of Nilson's motion for a new trial, the district court concluded that the instruction to the jury on materiality, coupled with the omission of an instruction on fraudulent intent, was prejudicial and therefore the interests of justice warranted granting Nilson a new trial.

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[2] E.g., United States v. Ivey, 322 F.2d 523 (4th Cir.), cert. denied, 375 U.S. 953 (1963).

The Fourth Circuit concluded that the district court's charge with respect to materiality was not prejudicial because materiality is a question of law for the court. 755 F.2d 362, 367, quoting, United States v. Norris, 749 F.2d at 1122. The Second, Fifth, Sixth, Seventh, Eighth, and District of Columbia circuits have also ruled that materiality is a question of law. United States v. Bernard, 384 F.2d 915, 916 (2d Cir. 1967); United States v. McIntosh, 655 F.2d 80, 82 (5th Cir. 1981), cert. denied, 455 U.S. 948 (1982); United States v. Abadi, 706 F.2d 178, 180 (6th Cir. 1983), cert. denied, ___ U.S. ___, 104 S. Ct. 86 (1984), United States v. Clancy, 276 F.2d 617, 635 (7th Cir. 1960); United States v. Richmond, 700 F.2d 1183, 1188 (8th Cir. 1983); Weinstock v. United States, 231 F.2d 699, 703 (D.C. Cir. 1956).

The Ninth and Tenth Circuits have held, however, that materiality is a question of fact for the jury. United States v. Irwin, 654 F.2d 671, 677 n.8 (10th Cir. 1981), cert. denied, 455 U.S. 1016 (1982); United States v. Valdez, 594 F.2d 725, 729 (9th Cir. 1979). The Fifth Circuit in United States v. Hausmann, 711 F.2d 615 (5th Cir. 1983), and the Eighth Circuit in United States v. Adler, 623 F.2d 1287, 1292 n.8 (8th Cir. 1980) have opined that materiality should be a question of fact, since it is an essential element of the offense.[3] This

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[3]The defendant in Hausmann argued that his Sixth Amendment right to trial by jury was infringed by withdrawal of this essential element of the offense from the jury's consideration. The Fifth Circuit found Hausmann's argument to this effect persuasive but felt bound by this Court's decision in Sinclair v. United States, 279 U.S. 263 (1929), to treat materiality as a legal issue. 711 F.2d at 617.

split in the circuits should be resolved by this Court.

The cases holding that materiality is a question of law for the court rely on this Court's decision in Sinclair v. United States, 279 U.S. 263 (1929) with respect to pertinency under 2 U.S.C. § 192 and dictum therein with respect to perjury charges. Sinclair held that pertinency, like relevancy, is an issue for the court, not the jury. 279 U.S. at 298. Sinclair predated, however, this Court's decisions in Mullaney v. Wilbur, 421 U.S. 684 (1975), and In re Winship, 397 U.S. 358 (1970), which held that the prosecution must prove to the trier of fact each essential element of a crime.

Materiality is an essential element of an offense under Section 1001 and the prosecution must prove each element of the

offense charged. Although the trier of fact in this case was the jury, the issue of materiality was determined by the court. Therefore, whether petitioners' Sixth Amendment right to trial by jury is infringed by withdrawal of the materiality issue from the jury is an important question of federal law which should be decided by this Court.

D. The Decision Below Either Applies a Different Standard to Appeals by the Government of New Trial Orders or Applies a Standard Different from that Applied in Other Circuits.

The standard traditionally applied by the courts of appeal in reviewing orders granting new trials is the abuse of discretion standard. E.g., United States v. Lauga, 726 F.2d 1032 (5th Cir. 1984); United States v. Lincoln, 630 F.2d 1313 (8th Cir. 1980); United States v. George, 568 F.2d 1064 (4th Cir. 1978). In granting the new

trial, the district court determined that the interests of justice warranted the new trial because the defendants were prejudiced by faulty instructions. In so ruling the district judge relied upon the consistent precedent of the Fourth Circuit,[4] and his understanding and observations of the events occurring at trial. By reversing the district court for applying the controlling law of the Fourth Circuit at the time the new trial order was entered and interpreting what the interest of justice requires, the panel has adopted a different standard of review of appeals from new trial orders.

The effect of the decision below is either to lessen the existing standards for

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[4]United States v. Seay, 718 F.2d 1279 (4th Cir. 1983); United States v. Miller, 658 F.2d 235 (4th Cir. 1981); United States v. Race, 632 F.2d 1114 (4th Cir. 1980).

all appellants, or create a new, less stringent standard of review of Government appeals from new trial orders, while continuing to exact a greater burden from appealing defendants. This dichotomy should be addressed by this Court.

CONCLUSION

The petition for certiorari should be granted to resolve the conflict among the courts of appeal and to settle the important questions about the necessary elements a jury must find present in order to convict a

defendant under 18 U.S.C. § 1001, and the standard of review when the government appeals a new trial order.

Respectfully submitted.

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May, 1985

APPENDIX A

[Caption omitted]

INTER, Chief Judge:

These three appeals, two of which were onsolidated with one another, are so elated that we decide them in a single pinion. Additionally, the decision of one f the appeals effectively decides the thers.

All of the appeals arise out of an ndictment against Nilson Van & Storage ompany and Howard A. Nilson, its president collectively referred to as "Nilson"), for rice-fixing in violation of the Sherman ct, mail fraud, and making false statements o a government agency in violation of 18 .S.C. § 1001. A jury convicted the efendants of making false statements but cquitted them on the other charges. While he indictments were pending, the Department f Defense, Nilson's largest customer,

suspended it from contracting with the government to render moving and storage services.[1] Together with Checker Transfer & Storage Company (Checker) and Miller Moving and Storage, Inc. (Miller), which were similarly indicted and similarly suspended, Nilson sued to set aside the suspension orders, and the district court granted a preliminary injunction barring the suspension.[2] No. 84-1336 is the

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1. Subsequent to the entry of the preliminary injunction, the Army modified the suspension to allow Nilson to conduct business with the Department of Defense as agent for other government contractors. However, Nilson was still prohibited from direct contracting with the government.

2. At trial, Checker and Miller were both acquitted on all counts. The government has therefore lifted their suspension, and it suggests that the injunction as it pertains to them should be vacated and the case remanded with instructions to dismiss for mootness. See United States v. Munsingwear, 340 U.S. 36 (1950). We will order this to be done.

government's appeal from the grant of interim injunctive relief.

After conviction, Nilson moved for a new trial on the ground, inter alia, that the district court had incorrectly charged the jury with regard to the elements of the false statements charge. Although the district court ruled that its instructions "taken as a whole" were correct, it concluded that out of "an abundance of caution" it should grant a new trial. The government then moved for reconsideration of the grant and reinstatement of the guilty verdict; and when its motion was denied, it appealed from the order granting a new trial. (No. 84-6634). Before the government's motion for reconsideration was decided, Nilson, having obtained the right to a new trial, moved to dismiss the false statements count of the original indictment on the ground that a new trial would violate

the guarantee against double jeopardy. The district court denied this motion, and Nilson appeals (No. 84-5180).

We conclude that we have jurisdiction to entertain the appeal in No. 84-6634 and that the government's appeal is meritorious. We therefore reverse the order granting a new trial, order the guilty verdicts reinstated, and direct that judgment be entered thereon. Because there is thus no need for a new trial, our ruling renders moot Nilson's appeal in No. 84-5180 in which it contents that it would be subjected to double jeopardy if retried. And because Nilson thus stands convicted of making a false statement in violation of 18 U.S.C. § 1001, the basis for granting a preliminary injunction against suspension is removed and the order granting the injunction must be reversed.

We consider the appeals in their logical order.

I.

No. 84-6634

This appeal presents two questions for decision, first, whether we have jurisdiction to entertain the appeal, and, if so, whether the district court correctly granted a new trial for legal error in its charge to the jury.

A. Jurisdiction

The question of jurisdiction arises because at the time that Nilson was convicted and at the time the district court granted Nilson a new trial (April 27, 1984), the government had no right of appeal from the adverse ruling. However, on May 9, 1984, it moved for reconsideration of the order granting a new trial, and the district court did no deny its motion until

September 19, 1984.[3] On October 12, 1984, the President signed into law the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, which, among other provisions and effective immediately, amended 18 U.S.C. § 3731 to afford the government a right of appeal from an order of a district court "granting a new trial after verdict or judgment." On October 18, 1984, the government filed a notice of appeal, and that date was within thirty days from denial of its motion for reconsideration.

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3. On September 10, 1984, the government sought a writ of mandamus in our court for an order directing the district court to reinstate the jury verdicts of guilty and to vacate its order granting a new trial. The petition was denied by another panel of the court without statement of reasons. See In re United States, No. 84-1959 (4 Cir. 1984) (unreported).

We think that the 1984 Act gives us jurisdiction to decide this appeal. By its terms, it authorizes the government to appeal from an order granting a new trial after verdict. Of course, an existing provision of § 3731, as well as the provisions of Fed. R. App. P. 4(b), provide that an appeal by the government shall be taken within thirty days after the entry of the order from which the appeal is taken, but it is settled law that a timely motion for rehearing or reconsideration tolls the running of the time for appeal. See United States v. Dieter, 429 U.S. 6 (1976); United States v. Healy, 376 U.S. 75 (1964). While it is true that the Federal Rules of Criminal Procedure do not specifically provide for motions for reconsideration and prescribe the time in which they must be filed, United States v. Healy, supra, treats as timely a motion for reconsideration filed

before the order sought to be reconsidered becomes final. Since § 3731, as amended, and Fed. R. App. P. 4(b) prescribe thirty days within which the government must appeal, we think that the government's motion to reconsider was timely[4] and that the government filed a timely appeal unless, of course, it is concluded that § 3731, as amended, has no application to an order granting a new trial after verdict when the order was entered prior to October 12, 1984.[5] We therefore turn to Nilson's argument that § 3731, as amended, does not have that retrospective effect.

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4. We note that the district court ultimately denied the government's motion for reconsideration on its merits and not on the ground that it was untimely.

5. We are aware that the Handbook on the Comprehensive Crime Control Act of 1984 and Other Criminal Statutes Enacted by the (Footnote Continued)

Usually, when there is a change in the law while a case is pending, a court applies the law in effect at the time of the decision and not antecedent law, unless so doing would result in manifest injustice or there is a statutory direction or legislative history to the contrary. See Bradley v. Richmond School Board, 416 U.S. 696, 711 (1974); United States v. Schooner Peggy, 1 Cranch, 103 (1801). The statute amending § 3731 so as to give the government

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(Footnote Continued)
98th Congress (December, 1984) published by the Department of Justice states that the government's new right to appeal from an order granting a new trial after conviction applies "to any new trial order entered on or after the effective date of the Act (October 12, 1984)" and further that "appeals of post-conviction new trial orders require the approval of the Solicitor General." Id. at 155. Since the Solicitor General obviously authorized the government's appeal in No. 84-6634, we can only conclude that the handbook expresses policy, but not necessarily law.

the right to appeal asserted in this case makes no provision as to whether it applies to orders granting a new trial entered before the effective date of the amendment, and we have not been referred to any legislative history, nor have we found any, bearing on the question. We therefore consider Nilson's claims of manifest injustice.

Nilson argues, first, that to recognize a government right to appeal this grant of a new trial would violate the prohibition against enactment of ex post facto laws contained in article 1, section 9 of the Constitution. We think that this argument must be rejected on the authority of Mallett v. North Carolina, 181 U.S. 589 (1901). In that case two defendants were indicted, tried, and convicted of conspiracy to defraud in the criminal court of Edgecombe County, North Carolina. They appealed to

the superior court, and it reversed the judgment of conviction and granted a new trial. While the case was pending in the superior court, the state enacted legislation giving it the right to appeal to the supreme court from an order of the superior court granting a defendant a new trial.[6] The state exercised this right, and the supreme court reversed the judgment of the superior court and directed that the sentence imposed by the trial court be carried into execution. Before the Supreme Court of the United States, defendants contended that since the statute giving the

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6. As an interesting aside, the legislation giving the state this right of appeal was applicable only to the eastern district of North Carolina of which Edgecombe County is a part. There was no such right for the western district. In the case a contention that the legislation denied equal protection of the laws was rejected.

state the right of appeal was enacted after the commission of the offense charged and the trial resulting in convictions, it was an ex post facto law invalid under article 1, section 10 of the Constitution.[7]

After an extensive review of its own precedents on ex post facto laws, the Court concluded:

> [W]e think it may be concluded that the legislation of North Carolina in question did not make that a criminal act which was innocent when done; did not aggravate an offense or change the punishment and make it greater than when it was committed; did not alter the rules of evidence, and require less or different evidence than the law required at the time of the commission of the offense; and did not deprive the accused

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7. Article 1, section 10 of the Constitution prohibits a state from passing an ex post facto law. In the instant case, Nilson asserts a violation of Art. 1, § 9 which prohibits Congress from passing an ex post facto law. We think that the two prohibitions are identical.

> of any substantial right or immunity possessed by them at the time of the commission of the offense charged.
>
> . . . .
>
> [T]herefore, we agree with the Supreme Court of North Carolina in holding that the law granting the right of appeal to the State from the Superior to the Supreme Court of the State was not an ex post facto law within the meaning of the Constitution of the United States.

181 U.S. at 597.

Nilson's second contention is that the reading that we give § 3731 would constitute manifest injustice because it would interfere with Nilson's "antecedent rights." We start with the observation that this argument may be answered in part by the conclusion in Mallett that the North Carolina statute "did not deprive the accused of any substantial right or immunity possessed by them at the time of the commission of the offense charged." Id.

The major difficulty in assessing the validity of the contention is that nowhere does Nilson clearly define the "antecedent rights" claimed to be infringed. Nilson argues that the case is a criminal prosecution, that appeals by the prosecution are exceptional and disfavored, and that ambiguous statutes giving the right of appeal to the prosecution should be strictly construed against the government. While we do not doubt the validity of these principles, we deem Bradley v. Richmond School Board, supra, the controlling authority, and it permits retrospective application of a statute enacted while litigation is pending unless such application results in manifest injustice.

We do not deem the nonexistence of a right to obtain review of the grant of a new trial, especially one which we will show was improvidently granted, to create an

antecedent right. This is particularly true where Nilson, having sought and obtained a new trial, now asserts that it would be subjected to double jeopardy if it is tried anew. While it may be distasteful to Nilson to have its apparent victory in setting aside its original conviction snatched from it, we do not think that it has any right to profit from that victory when, on the merits, the victory is not justified. Even before the amendment to § 3731, an unjustified post-verdict grant of a new trial could be redressed by the government by a petition for a writ of mandamus. See Will v. United States, 389 U.S. 90, 97-98 (1967), (citing Ex parte United States, 242 U.S. 27 (1916)); In re United States, 565 F.2d 173 (1 Cir. 1977); United States v. Newman, 456 F.2d 668 (3 Cir. 1972). The panel which considered the government's application for mandamus denied it for

reasons which it did not disclose. All the same, in light of the authorities cited, Nilson should not have assumed that the order granting a new trial was absolutely final. We therefore hold that the legislation giving the government the right to appeal a post-verdict grant of new trial enacted after Nilson's conviction did not interfere with any antecedent right of Nilson's and that retrospective application of the statute thus results in no manifest injustice.

B. The Merits

Nilson moved for a new trial[8] on the grounds that the district court was in error

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8. In fact, the motion was for a judgment of acquittal, or in the alternative, for a new trial. The judgment of acquittal was denied, and the correctness of this ruling is not before us. We therefore need not consider the grounds on which it was based.

in failing to instruct the jury that "fraudulent intent" was a requisite element of an infraction of the crime charged, and in instructing the jury that the materiality of the statements was a question for the court and not the jury and that the statements were material. Nilson also contended that the verdict was against the weight of the evidence.[9] The district court granted the motion on the ground, expressed in an oral opinion, that its instructions, while covering all essential elements of the crime, raised questions whether the elements were "stated in the sequential fashion" set forth in United States v. Race, 632 F.2d 1114 (4 Cir. 1980), so that "out of an

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9. Before us, Nilson does not advance the contention that the evidence was legally insufficient to warrant conviction.

abundance of caution, the motion for the new trial should be granted."

In denying the government's motion for reconsideration of this ruling, the district court, in a written opinion, advanced a different explanation of why the new trial was granted. This time the district court ruled that "fraudulent intent is an necessary element under 18 U.S.C. § 1001 [and] that the jury was not adequately instructed that fraudulent intent was an essential element which the government was required to prove." The district court commented on its observation that the instruction was not given in proper "sequential fashion" by saying that it had instructed the jury as to fraudulent intent with respect to the charge of mail fraud but that this aspect of its instructions could not compensate for its omission to give a similar charge with respect to the charge of

false statements, since "the jury may not have understood the necessary intent required for conviction [of false statements]." Finally, the district court assigned as a reason for granting the new trial its instruction to the jury that the statement made by Nilson was material.

Our very recent decision in United States v. Norris, ____ F.2d ____ (Nos. 83-5277-8, 4 Cir. December 5, 1984) decides, if indeed the law in this circuit was not settled, both that (1) "[t]here is no requirement that the false statement influence or effect the decision making process of a department of the United States government," ____ F.2d at ____, so that fraudulent intent is not a necessary element of the crime, and (2) "[m]ateriality is a question of law to be determined by the trial judge," ____ F.2d at ____. It therefore follows that the district court

granted the motion for a new trial on an erroneous legal basis. Its order granting the new trial will be reversed, the jury's guilty verdict reinstated, and the case remanded for entry of judgment on the verdict.

II.

No. 84-5180

Because we reverse the grant of the motion for a new trial and direct that the original verdict be reinstated, there is no occasion to retry Nilson. The claim that such retrial would place Nilson in double jeopardy is moot, and the appeal in No. 84-5180 will be dismissed.

III.

No. 84-1336

In granting interim injunctive relief against Nilson's suspension from contracting with the government pending trial of the criminal charges, the district court

proceeded on the basis that Nilson was entitled to relief, because, inter alia, the constitutionality of a suspension pending trial and before conviction was not a frivolous question. Indeed, Nilson's whole theory of the case was that there had been no conviction and that it would prevail on the merits of the criminal case.

Nilson now stands convicted, and it is manifest that interim injunctive relief must now be denied if, indeed, the case has not been rendered moot.

No. 84-6634 - REVERSED AND REMANDED.

No. 84-5180 - APPEAL DISMISSED.

No. 84-1336 - REVERSED.[10]

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10. As to Checker and Miller, the injunction granted is vacated and the case remanded to be dismissed for mootness. See n.2, supra.

APPENDIX B

[caption omitted]

ORDER

The appellees-appellants' petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of the Court requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Winter, with the concurrence of Judge Murnaghan and Judge Dupree.

For the Court,

JOHN M. GREACEN

CLERK